No. 90-1269

MOTION FILED
MAR 7 1991

In The

Supreme Court of the United States

October Term, 1990

FUNCTION JUNCTION, INC., et al.,

Petitioners,

v.

PAUL CROWE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 42.2

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MOTION FOR AWARD OF DAMAGES PURSUANT TO SUPREME COURT RULE 42.2 FOR FRIVOLOUS FILING OF PETITION FOR WRIT OF CERTIORARI.

Supreme Court Rule 42.2 (formerly R. 49.2) provides:

> When a petition for writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against

> the petitioner, appellant, or applicant, or against the party's attorney or against both.

Damages have been awarded in some recent cases. *E.g., Tatum v. Regents of the University of Nebraska*, 462 U.S. 1117, 103 S.Ct. 3084, 77 L.Ed.2d 1346 (1983); *Hyde v. Van Wormer*, 474 U.S. 992, 106 S.Ct. 403, 88 L.Ed.2d 355 (1985); *Hatch v. Reliance Insurance Co.*, 474 U.S. 1048, 106 S.Ct. 782, 88 L.Ed.2d 761 (1986). This case is appropriate for such an award.

As demonstrated in respondents' Brief in Opposition, the petition for writ of certiorari is patently frivolous. In *Jorgenson v. County of Volusia*, 625 F.Supp. 1543 (M.D. Fla. 1986), sanctions were imposed on Eric A. Latinsky, the same attorney representing petitioners here, pursuant to Fed. R. Civ. P. 11. Jorgenson, represented by attorneys Latinsky and Fred W. Fendt, filed a complaint and request for a temporary restraining order against enforcement of a county ordinance virtually identical to the City of Daytona Beach ordinance challenged here. In their supporting memorandum, Jorgenson's attorneys failed to cite the controlling cases, *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985) and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2529, 69 L.Ed.2d 357 (1981), even though Latinsky had represented Del Percio in the state court. *See* 625 F.Supp. at 1547. Instead, they urged the court to apply standards drawn from cases which did not involve the twenty-first amendment. *Id.* The trial court fined counsel $500 for "their misleading and unethical representation of the controlling law in Florida regarding an ordinance governing sexual display in establishments dealing in alcoholic beverages legislated under the Twenty-first Amendment." *Id.*

at 1549. This decision was appealed, and the Eleventh Circuit reversed the Rule 11 sanctions for failure to provide notice and a hearing. 824 F.2d 973 (11th Cir. 1987). The district court reaffirmed the sanctions after a hearing on remand; another appeal was taken and the sanctions were affirmed. 846 F.2d 1350 (11th Cir. 1987).

Latinsky represented these petitioners in their appeal before the Eleventh Circuit Court of Appeals. The 1990 opinion awarding damages pursuant to Fed. R. App. P. 38 cites reasons similar to those found in *Jorgenson*, 625 F.Supp. 1543. In respect to their argument that the ordinance was erroneously analyzed under the twenty-first amendment, the court stated that petitioners had failed to provide legal support, had failed "to address the string of Eleventh Circuit cases that have expressly analyzed virtually identical ordinances under the twenty-first amendment", and failed to address the Supreme Court decision in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939). Petitioners' App. A-8, 10. Petitioners' treatment of the other issues raised was found to be equally frivolous, with cases applied inappropriately, lack of legal support for arguments, and controlling precedents ignored or not distinguished. Petitioners' App. A. Request for rehearing or rehearing en banc was denied. Petitioners' App. B.

Despite the decision below clearly identifying the frivolous nature of the arguments, this petition for writ of certiorari was filed, *again* presenting conclusory, inappropriate, and unsupported arguments. Respondents have been forced to devote 39.25 hours of attorney time and expend the sum of $1230.13 in order to respond to

petition in accordance with professional standards and the Supreme Court Rules. *See* Respondents' App. 1.

The exceptional history of litigation as discussed above shows that the filing of this petition was a gross abuse of the judicial process which warrants an award of damages pursuant to Supreme Court Rule 42.2. "[E]very misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to the judicial process." *Talamini v. Allstate Insurance Company*, 470 U.S. 1067, 1073, 105 S.Ct. 1824, 1828, 85 L.Ed.2d 125 (1985) (Burger, C.J., dissenting). In *Hatch v. Reliance Ins. Co.*, 474 U.S. 1048, this Court granted a motion for damages pursuant to former Sup. Ct. R. 49.2 where a petition for writ of certiorari was filed and denied in a case which the Court of Appeals had found to be frivolous. *Hatch*, 758 F.2d 409 (9th Cir.) *cert. den.*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985).

CONCLUSION

Respondents request that this Court grant the motion for damages pursuant to Supreme Court Rule 42.2, and require petitioners to pay respondents an appropriate sum. Respondents suggest the amount of $5,000 or alternatively suggest that the matter be returned to the district court for determination of the amount due.

Respectfully submitted,

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City Attorney

MARIE HARTMAN
Assistant City Attorney

By: /s/ FRANK B. GUMMEY, III
Counsel of Record

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF VOLUSIA

Before me this day personally appeared FRANK B. GUMMEY, III, who, being duly sworn deposes and says:

1. I am a duly licensed attorney practicing law in Daytona Beach, Florida. I graduated from the University of Florida Law School in December 1972, and have been a member in good standing of the Florida Bar since 1973. I am a full time salaried officer of The City of Daytona Beach serving as City Attorney. My office staff includes three full time Assistant City Attorneys, each with over ten years experience.

2. In order to represent the City of Daytona Beach in accordance with professional legal standards and the Supreme Court Rules, my office has devoted the following hours of attorney time and incurred the following expenses:

DATE	ACTIVITY	HOURS
2-08-91	Review Pet. for Cert.	1.0
2-14-91	Review Pet. & opinions & cases cited	3.0
2-15-91	Review Sup. Ct. Rules	0.5
2-18-91	Research and drafting Response	6.0
2-19-91	Research and drafting Response	6.0
2-21-91	Research and drafting Response	4.0
2-22-91	Research and drafting Response	6.0
2-25-91	Drafting Response	3.5
2-25-91	Motion for fees	0.5
2-26-91	Research Rule 42.2	1.25
2-27-91	Motion for fees	2.5
2-28-91	Motion for fees	3.0

3-01-91	Motion for fees	1.0
3-06-91	Review of proofs from printer	1.0
	TOTAL HOURS	39.25

OUT-OF-POCKET EXPENDITURES

2-19-91	Copies at Vol. County Law Library 1 page @ $.25 per page (actual cost)	$ .25
2-21-91	Copies at Vol. County Law Library 15 pages @ $.25 per page (actual cost)	3.75
2-26-91	Copies at Vol. County Law Library 4 pages @ $.25 per page (actual cost)	1.00
2-28-91	Westlaw	40.00
3-01-91	Federal Express	22.50
3-07-91	Federal Express	15.00
3-07-91	Printing costs (Printers estimate)	1147.63
	TOTAL EXPENSES	1230.13

FURTHER AFFIANT SAYETH NOT.

/s/ FRANK B. GUMMEY, III

Sworn to and subscribed before
me this 7 day of March, 1991.
/s/ Evelyn Gonzalez
Notary Public, State of Florida
My commission expires: May 1994.